STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 31, 2023

IN THE MATTER OF:
Appeal Board No. 626384

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination holding, effective June 27, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10). The

claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed October 24, 2022 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer's school district as a per-diem substitute teacher since September 2018. The rate of pay for substitute teachers was $168.92 per day in the 2021-2022 school year and is anticipated to remain the same in the 2022-2023 school year. The claimant worked for the employer as a substitute teacher on 83 days in the 2021-2022 school year.

By letter dated June 21, 2022, the employer informed the claimant that they anticipated the need for per-diem substitutes during the 2022-2023 year and that the employer anticipated as much work for per-diem substitutes in the 2022-2023 school year as was available in the 2021-2022 school year and that the economic terms in the 2022-2023 school year would be substantially the same as in the prior school year. The letter further advised the claimant that her name was on a list used to offer work in the 2021-2022 school year and that such list would also be used to offer work in the following school year.

The employer uses an automated system to offer work to per-diem substitute teachers when full-time teachers call in absences. A clerk takes information provided by a substitute such as their name, address, call back number and the schools in which they are willing to work and enters that information into the automated system; the clerk was trained on the system. The system calls substitutes randomly from the list maintained in the system and such calls are made in both the morning and evening. In addition to calls from the system offering work, a substitute may obtain work from the system's website or directly from school administrators.

OPINION: Pursuant to Labor Law section 590 (10), reasonable assurance exists when the employer expresses a good-faith willingness to place the claimant's name on a "list" from which substitutes are called to teach and to offer per diem work to this claimant under substantially the same economic terms and conditions in the new school year as in the prior year. The court has held that the compilation and use of the list to call substitute teachers must be explained on the record (see, Matter of Sandick, 197 AD2d 737, 3d Dept 1993). Therefore, it is the responsibility of the employer to demonstrate with competent testimony from knowledgeable witnesses that these basic conditions have been met. Absent such proof there is no reasonable assurance of continued substantially similar employment in an instructional capacity as a per diem substitute teacher (See Appeal Board Nos. 552093 and 551885).

In this case, the credible evidence fails to establish that the employer provided the claimant with reasonable assurance of being employed in the 2022-2023 school year under the same economic terms and conditions as in the 2021-2022 school year. The employer has not established that either of their witnesses was competent to testify and knowledgeable about how the employer offers work to substitute teachers. A labor relations specialist who testified for the employer did not know how the automated system works to

offer work to substitutes and was not aware of how many days of work were offered to the claimant in the 2021-2022 school year.

We turn now to the competency of the clerk who testified for the employer. Although the clerk testified that she received training on the system, she offered no specifics, such as when she received training or what such training encompassed, to determine whether she was knowledgeable about how the system is used to offer work to substitutes or simply knowledgeable about how to enter data into the system. Her testimony regarding what information she enters into the system would establish how the information in the employer's system is compiled but does not establish how the system is used to offer work to substitutes. Moreover, this witness offered no testimony as to what information is relayed to the substitute when a call from the system offering work is made or how many days of work were offered to the claimant by calls from the system.

Significantly the clerk testified that a substitute may also obtain work through the system's website as well as directly from school administrators. However, with respect to the website, there was no testimony as to how or when a substitute can gain access to the website, what offers a substitute can access once on the website or how many days of work the claimant was offered via the employer's website, if any. As to the administratively offered days of work, the record is further devoid as to whether any such offers were made to the claimant and, if so, whether such offers are registered with the employer's system. Lacking a sufficient competent basis, we find that the employer has failed to establish that the offer of reasonable assurance made to the claimant in June 2022 was a bona fide offer of reasonable assurance. We, therefore, conclude that the provisions of Labor Law § 590.10 do not apply

to the claimant.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, holding, effective June 27, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

JUNE F. O'NEILL, MEMBER